LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 8 1961
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1961

LENOIR FINANCE COMPANY,
Appellant,

v.

JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, (W. A. JOHNSON, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA, SUBSTITUTED DEFENDANT),
Appellee.

No. 490

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION TO DISMISS

Thomas Wade Bruton
Attorney General of North Carolina
Justice Building
Raleigh, North Carolina

Lucius W. Pullen
Assistant Attorney General
of North Carolina
Justice Building
Raleigh, North Carolina
Counsel for Appellee

Peyton B. Abbott
Charles D. Barham, Jr.
Assistant Attorneys General
of North Carolina
Of Counsel

TABLE OF CONTENTS

Opinion Below 1

Statement of Case 1

No Substantial Federal Question Presented 3

Motion to Dismiss 15

Appendices:

A. Statute Involved 16

B. Statement and Opinion of the Supreme Court of North Carolina 17

C. Order on Petition to Rehear 25

TABLE OF AUTHORITIES

Cases

Allied Stores of Ohio v. Bowers, 358 U. S. 522 11

American Equitable Assurance Company v. Gold, 249 N. C. 461, 106 S. E. (2d) 875 13

Austin v. City of Seattle, 176 Wash. 654, 30 P. 2d 646 13

Bell's Gap R.R. Co. v. Penn., 134 U. S. 232 13

Bradley v. City of Richmond, 110 Va. 521, 66 S. E. 872, *Affirmed*, 227 U. S. 477 11

City Council v. Clark & Co., 124 Ga. 651, 52 S. E. 881 11

Clark v. Maxwell, Commissioner of Revenue, 197 N. C. 604, 150 S. E. 190, *Affirmed*, 282 U. S. 811 3

Concordia Fire Insurance Company v. Illinois, 292 U. S. 535 12

Connolly v. Union Sewer Pipe Co., 184 U. S. 540 9

Cowart v. Greenville, 67 So. C. 35, 45 S. E. 122 11

Dewey v. Richardson, 206 Mass. 430, 92 N. E. 708 11

First Nat. Bank v. Anderson, 269 U. S. 341 8

Gulf, Colorado & Santa Fe Railway v. Ellis, 165 U. S. 150 9

Hanover Fire Ins. Co. v. Harding, 272 U. S. 494 13

Iowa-Des Moines Nat. Bank v. Bennett, 284 U. S. 239 8

Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53, *Affirmed*, 200 U. S. 226 6

Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316, *Appeal Dismissed*, 308 U. S. 516 ..... 4, 14

Link v. Commonwealth, 205 Ky. 243, 265 S. W. 804 ..... 13, 14

Louisville Gas and Electric Company v. Coleman, 277 U. S. 32 12
Minneapolis, St. P. & S. Ste. M. R. Co. v. Merrick Co., 254 U. S. 376 3
Morris v. City of Lincoln, 93 Neb. 658, 142 N. W. 114 14
Nesbitt v. Gill, 227 N. C. 174, 41 S. E. (2d) 646, *Affirmed*, 332 U. S. 749 14
Ormes v. Tennessee Finance Co., 152 Tn. 40, 269 S. W. 3 14
Power Mfg. Co. v. Saunders, 274 U. S. 490 9
Puget Sound Power and Light Company v. Seattle, 291 U. S. 619 .. 6
Quaker City Cab Company v. Pennsylvania, 277 U. S. 389 12
Quong Wing v. Kirkendall, 223 U. S. 59 7
F. S. Royster Guano Co. v. Va., 253 U. S. 412 13
Shinn v. Oklahoma City, 59 Okl. Cr. 433, 61 P. 2d 1126 13
Southern Railway Co. v. Greene, 216 U. S. 400 ..... 9, 12
State Board of Tax Commissioners v. Jackson, 283 U. S. 527 9
Stebbins v. Riley, 268 U. S. 137 9
Stone v. General Electric Contracts Corporation, 193 Miss. 317, 7 So. 2d 811 ..... 4, 5, 13
Stone v. Universal Credit Company, 193 Miss. 354, 7 So. 2d 820 ....4, 13
Stone v. Yellow Manufacturing Acceptance Corporation, 193 Miss. 338, 7 So. 2d 820, *Affirmed*, 317 U. S. 591, *Rehearing Denied*, 317 U. S. 708 ..... 4, 13
Wheeler Steel Corp. v. Glander, 337 U. S. 562 11
Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 12

Other Authorities

North Carolina Public Laws of 1929, Ch. 345, § 148 1
North Carolina Public Laws of 1939, Ch. 158, § 940 5
North Carolina General Statutes, § 105-83 ..... 1, 2, 5, 6, 11, 15
North Carolina General Statutes, § 105-228.11 8
North Carolina General Statutes, § 105-228.12 2
Rule 15 (1) (e), Revised Rules of the Supreme Court of the United States 3
Rule 16 (1) (b), Revised Rules of the Supreme Court of the United States 3
United States Code, Title 12, § 548 ..... 2, 8, 11
53 Corpus Juris Secundum, *Licenses*, § 22, p. 544, n. 46 4
1939 Session Laws of North Carolina, Ch. 158, § 148 1

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 254 N. C. 129, 118 S. E. (2d) 543, and is reprinted herein as Appendix B.

STATEMENT OF CASE

The appellant is a corporation organized under the laws of the State of North Carolina and it is engaged in the business of an Installment Paper Dealer, as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina, and is generally engaged in the automobile financing business. A stipulation to this effect was included in the first paragraph of the Agreed Statement of Facts, upon which this case was heard by the trial court. The statute involved, G. S. 105-83, is printed in full herein as Appendix A.

Since 1929, the State of North Carolina has imposed an annual license tax of $100.00 and an additional license tax measured by the gross amount of installment paper handled upon installment paper dealers. Chapter 345, §148, 1929 Public Laws of N. C. During 1959, a similar annual license tax of $100.00 and the additional license tax measured by the amount of gross business was collected from this plaintiff and other persons, firms or corporations, foreign or domestic, engaged in the business of acting as installment paper dealers in North Carolina under G. S. 105-83; Section 148, Chapter 158, 1939 Session Laws of N. C., as amended.

From 1929 to the present, the North Carolina Installment Paper Dealers License Tax Law has contained an exemption reading:

> "(d) This section shall not apply to corporations organized under the State or national banking laws."

The appellant contends that this exemption of State and national banks from the North Carolina Installment Paper Dealers License Tax results in deprivation of property of the appellant without due process of law and denial of the equal protection of the laws by the State of North Carolina in levy-

ing and collecting the Installment Paper Dealers additional license tax from appellant for a part of the year 1959. The stipulated facts, on which the case was heard below, show that many of the State and national banks in North Carolina actually perform the same function as Installment Paper Dealers, as defined in G. S. 105-83, and it is conceded that the banks engaging in this function are "in substantial competition" with the appellant herein.

It was also stipulated in the Agreed Statement of Facts, on which this case was tried below, that North Carolina levies an annual excise tax on every State and national bank doing business in North Carolina. The tax is measured by a percentage of the entire net income of the banks. The tax is levied upon banks for the privilege of transacting the banking business in North Carolina during the calendar year for which the tax is levied. Section 105-228.12 of the North Carolina General Statutes. It was also stipulated that the sole authority of North Carolina to tax national banks was contained in Title 12, U.S.C., § 548, that North Carolina *did not* impose the Installment Paper Dealers license tax upon State or national banks, that it *could not* impose the Installment Paper Dealers license tax upon national banks, that, since 1957, North Carolina had taxed State and national banks in the same manner and under the same statutory provisions.

The most significant stipulations, upon which this case was tried below, are printed at pages 6 through 9 of the Jurisdictional Statement filed herein by appellant. These agreed facts, in summary, show that North Carolina imposes a flat, annual license tax on persons, firms and corporations, *foreign or domestic*, engaged in the business of acting as installment paper dealers in North Carolina, that State and national banks, as a part of their banking business, do some of the same things that Installment Paper Dealers do, to wit: ". . . buying and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in . . ." North Carolina, that such paper is taken to

secure payment of the obligations which they represent. On these facts, appellant contends that the fact that North Carolina allows State and national banks to *compete* with Installment Paper Dealers without paying the same license tax makes the additional license tax upon appellant unlawful as being in contravention of the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The State of North Carolina contends that its legislature has the power to classify for tax purposes, that it lawfully exercised its powers of classification in placing State and national banks in one class and in placing the appellant and others engaged in the installment paper dealer business in another class, that the facts in this case do not reveal any deprivation of property of appellant without due process of law or any denial of equal protection of the laws to the appellant by the State of North Carolina. Hence, no substantial Federal question is presented.

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

This case, in which appellant seeks to have reviewed a decision of the highest court of the State of North Carolina, does not present a substantial Federal question and ought to be dismissed. Rule 16(1)(b). The Jurisdictional Statement filed herein does not show that substantial Federal questions are presented, such as require a full consideration of this case by this Court. Rule 15(1)(e). Where the questions raised below have been answered by this Court and are no longer open, review should not be allowed. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Merrick Co.*, 254 U. S. 376. This Court has affirmed, without opinion, a decision of the North Carolina Supreme Court upholding the constitutionality of one of its license tax statutes, where the court below relied on authoritative decisions by the Supreme Court of the United States holding that state legislatures had the power to classify for tax purposes and that the classification would be upheld unless clearly arbitrary. *Clark v. Maxwell*,

Commissioner of Revenue, 197 N. C. 604, 150 S. E. 190, *affirmed* 282 U. S. 811. This Court has also dismissed an appeal, for want of a substantial Federal question, from a North Carolina Supreme Court decision upholding the validity of a license or privilege tax imposed on retail merchants and measured by three per cent of gross sales. Ample authorities of this Court are catalogued therein demonstrating the powers of the State to classify for tax purposes, to draw distinctions which are not arbitrary, and to discriminate among classes based on reasonable differences. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316, *appeal dismissed* 308 U. S. 516. A review of the opinion of the North Carolina Supreme Court in the instant case would add nothing new to the compendium of authority now available on the constitutional questions decided below.

This Court had an opportunity to consider the question of the validity of a State privilege license tax similar to the one in this case, when the Mississippi Supreme Court sustained the validiy of its statute in a series of cases in 1942. A summary of the principle of legislative classification approved in those cases appears at 53 C.J.S., *Licenses*, §22, page 544, n. 46, which reads:

"Finance companies and banks

"Fact that the statute levying a privilege tax on every person doing a business of acquiring notes or other forms of indebtedness secured by liens on automobiles and other tangible personalty exempts banks from the tax does not render statute unconstitutional as applied to a finance company, since there is a reasonable basis for distinction between such companies and banks." (citing *Stone v. General Electric Contracts Corporation*, 193 Miss. 317, 7 So. 2d 811, *followed* in *Stone v. Universal Credit Company*, 193 Miss. 354, 7 So. 2d 820, and *Stone v. Yellow Manufacturing Acceptance Corporation*, 193 Miss. 338, 7 So. 2d 820, *affirmed* 317 U. S. 591, *rehearing denied* 317 U. S. 708.)

In *Stone v. General Electric Contracts Corporation, supra,* the Mississippi Court said that banks were required to bear their rightful share of taxes necessary for the support of the State, that they did this in exchange for the right to engage in a "general banking business", and that there was a reasonable basis for a distinction between banks and the appealing finance company. It did appear that this Court had jurisdiction in the companion cases involving the same state tax, and this Court approved the holding of the Mississippi Court by a *per curiam* opinion granting the motions to affirm and affirming the judgments below. The Mississippi Court, in its opinions dealing with the license tax in question, cited decisions of this Court as the basis for its conclusions regarding the constitutional questions raised.

The only question involved in this case is whether the distinction drawn by the North Carolina General Assembly between installment paper dealers and banks, which admittedly deal in notes and chattel mortgages as do installment paper dealers, is valid. Of course, the problem with which appellant is really concerned is the question of competition from banks. If appellant were really concerned about the fact that national and state banks were not required to pay the same license tax as appellant, this question could easily be answered by a severability clause contained in the North Carolina Revenue Act, as amended, reading:

> "If any clause, sentence, paragraph, or part of this Act for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." Section 940, Chapter 158, 1939 Public Laws of N. C.

It is apparent that appellant is not as interested in seeing the exemption removed as it is in avoiding payment of the additional license tax imposed by G. S. 105-83(b). The ap-

pellant does not complain of the $100.00 annual license tax levied, assessed and collected from it under authority of G. S. 105-83(a). This action was instituted to recover only the *additional license tax* paid by the appellant under G. S. 105-83(b). (Opinion Below; Appendix B)

In its Jurisdictional Statement, appellant argues that banks "...directly compete with a large segment of the business community..." (p 11), that the installment paper offices of some banks are kept open "... *all day (until five o'clock)*" (p 13), that banks are "... doing approximately 50% or more of the installment paper dealer business..." in North Carolina (p 18) (this information not in evidence anywhere), that installment paper dealers pay approximately $600,000.00 to the State of North Carolina annually for the additional license tax (p 18) (this information not in evidence anywhere), "...that the net result of the act is a highly inequitable discrimination against many foreign corporations that have domesticated in North Carolina to carry on their financial activities..." (p 19) (the question of burden on interstate commerce not raised by pleadings or evidence). This Court has formerly said that:

> "The State may tax different types of taxpayers differently even though they compete ... legislation may protect from the consequences of competition but the Constitution does not. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. These were risks which appellant took when it entered the field." *Puget Sound Power and Light Company v. Seattle*, 291 U. S. 619.

In another case where different tax treatment was given to a meat packing house doing business in North Carolina in direct competition with commission merchants, brokers and butchers engaged in the business of selling packing house products similar to those sold by the defendant, the validity of the tax classification was upheld. *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53, *affirmed* 200 U. S.

226. The net result of that case is the establishment of the principle that two persons selling meat at wholesale may be separately classified for license tax purposes upon any reasonable grounds of distinction, and that principle has been approved by this Court on many occasions.

In *Quong Wing v. Kirkendall*, 223 U. S. 59, a Montana laundry license tax statute was declared valid by this Court even though it exempted steam laundries and women engaged in the laundry business where not more than two women were employed. Of this statute making a distinction between hand laundries and steam laundries, Mr. Justice Holmes said:

> "A state does not deny the equal protection of the laws merely by adjusting its revenue laws and tax system in such a way as to favor certain industries or forms of industry . . . If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair . . . the 14th Amendment does not interfere by creating fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the state."

Installment Paper Dealers are engaged in buying, discounting and dealing in installment paper. Banks are financial institutions which accept deposits for safekeeping, make direct loans to customers, issue certificates of deposit, cashier's checks and certified checks, and generally engage in a great many activities which distinguish banks and the banking business from Installment Paper Dealers and the business of dealing in installment paper. The North Carolina General Assembly saw a difference and promulgated licensing and taxing provisions based on that difference. The Supreme Court of North Carolina, applying well defined principles of constitutional law enunciated by this Court, found the classification to be reasonable, not arbitrary, and sustained the imposition of a license tax on installment paper dealers while exempting state and national banks from the same

tax. It is to be noted that a privilege license tax is imposed elsewhere by the State of North Carolina on state and national banks.

Congress has approved the separate classification of national banks for taxing purposes in the enactment of the statute now codified as Title 12, United States Code, Section 548. National banks may be taxed by a state only as expressly permitted by Congress. *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239; *First Nat. Bank v. Anderson*, 269 U. S. 341. The validity of 12 U.S.C. §548, has been sustained. *First Nat. Bank v. Anderson, supra.* Since 1957, the State of North Carolina has classified all state banks along with national banks and has imposed a privilege license tax on all of them in the same manner, including commercial banks, industrial banks, savings banks, trust companies or any combination of such facilities. G. S. 105-228.11. If the separate classification of banks from other financial institutions performing *one* of the functions of a bank is justified, a review by this Court would merely prolong this case and serve no useful purpose as no substantial Federal question is raised by the appeal from the State Court.

In the Jurisdictional Statement filed by appellant, many decisions of the United States Supreme Court are cited in support of the contention that the Federal questions presented by this appeal are substantial. When those cases are closely examined, it will be seen that they enunciate general propositions of constitutional law, which are well settled. It is those principles of law which the North Carolina General Assembly has followed in imposing license taxes on the appellant and others engaged in the same business, and those general principles are the basis for the decisions of the North Carolina Supreme Court. The cases cited are *not* authority for the proposition that a substantial Federal question is raised on this appeal. For example, appellant argues at page 15 of the Jurisdictional Statement that "Classification must always rest upon distinctions which bear a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily without such

basis." With this principle, we agree. With the holdings of the cases there cited, we agree. A statute requiring railroad companies, who refuse to pay claims against them within a certain time, to pay $10.00 in attorneys' fees, when judgment is rendered against the railroad on the claim, is a denial of due process and equal protection of the laws, as such a statute imposes a burden on railroads while not requiring other individuals and corporations in similar circumstances to bear the same burden. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. This case clearly illustrates what a state legislature *may not* do. An inheritance tax adopted by California is valid even though it does not allow a deduction of an estate tax in determining market value of the property in the estate. *Stebbins v. Riley*, 268 U. S. 137.

We agree that a state may not discriminate in favor of a domestic railroad by imposing a franchise tax on foreign corporations doing a railroad business within the state when domestic corporations doing the same business do not pay the tax. *Southern Railway Co. v. Greene*, 216 U. S. 400. We agree that Illinois could not constitutionally exempt agricultural and livestock dealers from its statute prohibiting restraint of trade, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. We also think this Court was correct in declaring invalid an Ohio venue statute which treated domestic corporations different from foreign corporations, *Power Mfg. Co. v. Saunders*, 274 U. S. 490, and this Court correctly upheld Indiana's graduated occupational tax, which resulted in a higher tax on chain stores than on stores individually operated, *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, but none of these cases cited at page 15 of the Jurisdictional Statement filed herein give any support to the contention that a substantial Federal question is presented by the appeal of the instant case.

In an opinion by Mr. Justice Roberts, in the last cited case, the constitutional principles on which the validity of the North Carolina license taxing statute is founded are stated as follows:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. (Citing cases.) The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. (Citing cases.) As was said in *Brown-Forman Co. v. Kentucky*, supra (217 U. S. 573, 54 L. ed. 887, 30 S. Ct. 578):

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear." *supra*, p. 537.

Beginning on page 18 of the Jurisdictional Statement, appellant argues that there are questions presented on ap-

peal which are so substantial as to require plenary consideration by the Court. All of that argument on pages 18 and 19 deals with some evidence, *not heretofore presented in the case*, regarding the amount of tax paid to the State of North Carolina by all installment paper dealers, the amount of installment paper purchased or handled by banks, and alleged discrimination against foreign corporations carrying on business in North Carolina. Appellant attempts to relate this to the "due process" argument, but it should be enough to say that the appellant is a *"small* North Carolina corporation" (p. 1, Jurisdictional Statement of Appellant), and it has no standing to present, at this stage, an argument to the effect that North Carolina discriminates against foreign financial corporations by imposing on them a burdensome tax, while not imposing the same tax on State and national banks doing business in North Carolina.

On page 20 of the Jurisdictional Statement filed herein, appellant concedes that the State of North Carolina could not impose an additional license tax, measured by a percentage of installment paper business handled, on national banks. Appellant also observes that the Federal statute, 12 U.S.C. § 548, has nothing to do with taxation of state banks, but there is nothing to suggest that the North Carolina General Assembly has exceeded its classification powers in taxing State and national banks on the same basis.

At the same place, appellant cites authority to the effect that a state may not constitutionally discriminate in favor of its own residents and against the residents of another state. *Allied Stores of Ohio v. Bowers*, 358 U. S. 522; *Wheeler Steel Corp. v. Glander*, 337 U. S. 562. We agree with the constitutional principles enunciated, but the North Carolina licensing tax statute which offends the appellant in this case applies to all persons, firms or corporations engaged in the installment paper dealer business, ". . . foreign or domestic . . .". G. S. 105-83(a) (Appendix A)

At page 21 of the Jurisdictional Statement, the appellant argues that the North Carolina license tax on installment

paper dealers is a ". . . burdensome tax and can conceivably be the difference between a profit or loss, as this tax must be paid whether a dealer makes a net operating income or not." The same can be said of many franchise and license taxes lawfully levied, but there is nothing in evidence in this case to prove that the license tax of which appellant complains is so burdensome as to amount to a deprivation of property without due process of law. The only evidence in the case regarding the impact of the tax on the appellant is the stipulation to the effect that the appellant paid $1911.36 to the State for one quarter during the year 1959. The test whether property has been taken without due process is ". . . whether the taxing power asserted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444. There is no evidence in this case to prove the absence of justification for taxing appellant in a different manner than banks are taxed.

In its argument that the North Carolina tax deprived appellant of its property without due process, the appellant cites *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, in which this Court held that a state could not tax corporations operating taxicabs in a different way than it taxed individuals and partnerships operating taxicabs. Under the North Carolina statute in question, all installment paper dealers, individual and corporate, are taxed alike.

In *Louisville Gas and Electric Company v. Coleman*, 277 U. S. 32, cited at page 22 of appellant's Jurisdictional Statement, it was held that a mortgage recording tax was invalid, where mortgages maturing within five years were excepted from its provisions, but it was said in the same case that the legislature could validly exempt mortgages given to building and loan associations from the recording tax. In *Concordia Fire Insurance Company v. Illinois*, 292 U. S. 535, this Court held that a tax on net receipts of insurance companies which discriminated against foreign insurance companies was not valid. Here again, the North Carolina statute applies alike to foreign and domestic installment paper dealers. The case of *Southern Ry. Co. v. Greene*, 216 U. S. 400, also deals with a

state tax discriminating against foreign corporations and in favor of domestic corporations. *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494, and *F. S. Royster Guano Co. vs. Va.*, 253 U. S. 412, cited at page 23 of the Jurisdictional Statement, deal again with discrimination in taxing statutes between domestic and foreign corporations. We agree that this may not be done without contravening the Fourteenth Amendment to the United States Constitution. The *Bell's Gap R. R. Co. vs. Penn.* case, 134 U. S. 232, holding that a state statute imposing a tax on bonds and the method of collection of same do not deny due process, like the other authority cited in the Jurisdictional Statement, does not sustain the proposition that this case presents substantial Federal questions which should be considered and answered by this Court.

At pages 23 and 24 of the Jurisdictional Statement, appellant cites *American Equitable Assurance Company v. Gold*, 249 N. C. 461, 106 S. E. (2d) 875, in which the North Carolina Supreme Court declared a fire insurance premiums tax to be discriminatory and unconstitutional. The reason the tax was declared to be discriminatory was that it was passed on to purchasers of fire insurance unequally. The Court called attention to the fact that the tax was not placed on the insurance companies as a condition to writing insurance. It was not, therefore, a license tax, which was involved in that case. The case does not suggest that the State of North Carolina is powerless to discriminate between different classes of insurance companies in levying a license tax.

State courts have long understood that a privilege license tax may be validly imposed upon lending agencies acquiring notes on personal property as security while exempting banks from such a tax. *Austin v. City of Seattle*, 176 Wash. 654, 30 P. 2d 646; *Link v. Commonwealth*, 205 Ky. 243, 265 S. W. 804; *Shinn v. Oklahoma City*, 59 Okl. Cr. 433, 61 P. 2d 1126; *Stone v. General Electric Contracts Corporation, supra; Stone v. Universal Credit Company, supra;* and *Stone v. Yellow Manufacturing Acceptance Corporation, supra*, which was affirmed by this Court in 1942.

State courts have also long understood that valid distinctions may be made in the licensing of certain persons engaged in the money lending business while exempting or excepting banks. Some of these cases are listed at the close of the opinion below. (Appendix B) *Dewey v. Richardson*, 206 Mass. 430, 92 N. E. 708; *Cowart v. Greenville*, 67 So. C. 35, 45 S. E. 122; *City Council v. Clark & Co.*, 124 Ga. 651, 52 S. E. 881; *Morris v. City of Lincoln*, 93 Neb. 658, 142 N. W. 114; *Link v. Commonwealth, supra, Ormes v. Tennessee Finance Co.*, 152 Tn. 40, 269 S. W. 3; *Bradley v. City of Richmond*, 110 Va. 521, 66 S. E. 872, *affirmed* 227 U. S. 477.

The power of states to classify those engaged in different types of businesses for the purpose of imposing privilege license taxes has long been recognized. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316, appeal dismissed for want of a substantial Federal question, 308 U. S. 516 (where Stacy, C. J., catalogued some permitted distinctions in tax classification and cited principal decisions of this Court on the subject.)

The North Carolina Supreme Court had a State privilege license tax case before it in 1947. *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. (2d) 646. The statute imposed a flat annual tax on certain dealers in horses and mules and an additional license tax graduated according to volume of business. Two significant excerpts from the opinion in that case summarize the understanding of North Carolina taxing authorities and judicial authorities as to the powers of the State to levy privilege or license taxes similar to the one in the instant case without contravening the Fourteenth Amendment of the Constitution of the United States.

(1) "The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax."

(2) "It has been the practice of our General Assembly for many years to levy what is considered a nominal sum for an annual license for engaging in some classes of trades and to levy in addition thereto, an additional privilege or license tax measured by some reasonable method for as-

certaining the volume of business transacted in the State." p. 179.

The decision of the North Carolina Supreme Court was affirmed in a *per curiam* decision at 332 U. S. 749.

We think it is clear that the North Carolina General Assembly acted within the due process and equal protection limitations imposed by the Fourteenth Amendment in adopting G. S. 105-83, in providing therein for an exemption of State and national banks from the license tax on persons, firms and corporations, foreign and domestic, engaged in the "Installment Paper Dealer" business in North Carolina, and in levying a tax at an annual rate with an additional license tax measured by volume of business and applying equally to all of those within the described class. There was no violation of the Fourteenth Amendment in the collection of the Installment Paper Dealers License Tax from the appellant herein, and this case does not present a substantial Federal question.

MOTION TO DISMISS

For the reasons hereinbefore set out, the Attorney General of North Carolina moves the Court to dismiss this appeal on the ground that it does not present a substantial Federal question.

Respectfully submitted,

Thomas Wade Bruton
Attorney General of North Carolina

Lucius W. Pullen
Assistant Attorney General of North Carolina
Counsel for Appellee

Peyton B. Abbott
Charles D. Barham, Jr.
Assistant Attorneys General of North Carolina
Of Counsel

APPENDIX A

Statute Involved

§105-83. Installment paper dealers.—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligation, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business of dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State un-

til and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section.

The foregoing statute is contained in Subchapter I of Chapter 105 of the General Statutes of the State of North Carolina (The Revenue Act of North Carolina, as amended), Volume 2C, page 580, 1958 Replacement Volume, General Statutes of North Carolina.

APPENDIX B

Statement and Opinion of the Supreme Court of North Carolina

Appeal by plaintiff from *Hobgood, J.*, June 1960 Civil Term, of Wake. Docketed and heard here as No. 454, Fall Term, 1960.

Plaintiff seeks to recover $1911.36, taxes paid under protest. It alleges the statute under which the tax was levied is unconstitutional and void.

By agreement of the parties plaintiff's right to recover was made to depend on facts summarized and quoted as follows:

(1) Plaintiff is a domestic corporation with offices in Lenoir, Statesville, Hendersonville, Elkin, and Forest City, N. C. "The plaintiff is engaged in the business of an installment paper dealer as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina and is generally engaged in the auto finance business.

(2) The provisions of G. S. 105-83 are quoted as a part of the stipulated facts.

(3) "Many of the State and National Banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank installment paper dealers, and are doing a substantial volume of the installment paper dealer business in North Carolina."

(4) Plaintiff, an installment paper dealer and auto finance company, pays to North Carolina franchise, license, intangible, sales, and income taxes, and pays to the counties and cities in which it operates *ad valorem* taxes on its real and personal property. The taxes paid include the taxes levied pursuant to the provisions of G. S. 105-83.

(5) Plaintiff made the reports required by subsection (b) of G. S. 105-83 for the quarter ending 30 September 1959 and paid under protest $1911.36 as taxes imposed by said subsection, based on the report so made. The amount so paid was in addition to the tax levied pursuant to subsection (a) of G. S. 105-83.

(6) Within thirty days after payment plaintiff made written demand for refund. The demand was rejected. Plaintiff then instituted this action.

(7) Banks doing business in North Carolina, including national banking associations, are required by G. S. 105-228.12 to pay an excise tax equal to 4-1/2% of their net income. The tax levied pursuant to that section is, by G. S. 105-228.13, in lieu of State intangible property, franchise, and income taxes, and taxes levied on tangible personal property by local taxing jurisdictions. State banks also pay the fees authorized by G. S. 53-122.

(8) National banks are taxed by North Carolina to the extent and manner permitted by Title 12, USCA, sec. 548.

"(9) The tax imposed by North Carolina General Statutes 105-83 on installment paper dealers is not imposed upon

State or National banks, though many of them are also installment paper dealers in addition to their other activities, and by virtue of the provisions of Title 12, USCA, Section 548, such a tax may not be imposed upon National banks.

"(10) A substantial number of State and National Banks doing business in North Carolina engage in the business of installment paper dealers as defined in G. S. 105-83, in addition to their other activities, as do the plaintiff and other non-bank installment paper dealers. All such installment paper dealers, banks and non-banks engage in substantially identical operations with respect to their installment paper business, which do not differ in any material respect, either as to the methods and mechanics of acquiring installment paper, or as to the business arrangements with the automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise. In general and in detail, the conduct of installment paper dealer business in North Carolina is and was at all times mentioned in the Complaint the same in all substantial and material respects, as engaged in and carried on by State and National banks and the plaintiff and other non-bank installment paper dealers.

"(11) In a substantial number of banks this installment paper dealer business is handled by a separate department of the bank commonly known as an Installment Loan Department or as a Time Payment Department, often in an office or building entirely separate from the main bank building, and the records, bookkeeping and management personnel in such department devote their full time exclusively to the contracting for, acquisition of, collecting of, servicing of this installment paper and to other work incident to this phase of the bank's operations and the same is substantially identical to the operations of non-bank installment paper dealers. Many of the banks maintaining Installment Loan Departments or Time Payment departments keep these departments open beyond regular banking hours to conform to hours maintained by the plaintiff and other non-bank installment paper dealers.

"(12) It is further agreed that no facts other than those stated hereinabove are material or necessary to the decision of this case.

"(13) The question involved in this case is whether or not G. S., Section 105-83 of the General Statutes of North Carolina, is unlawfully discriminatory and unconstitutional. If so, the plaintiff is entitled to recover of the defendant the sum of $1,911.36 with interest; and, if not, the plaintiff is not entitled to recover."

The court, being of the opinion that the statute is not unlawfully discriminatory or unconstitutional as applied to plaintiff, adjudged it take nothing. Plaintiff appealed.

Taylor, Allen and Warren and Fairley, Hamrick & Jack T. Hamilton for plaintiff, appellant.

Attorney General Bruton and Assistant Attorneys General Abbott and Young for defendant, appellee.

RODMAN, J. W. A. Johnson, successor in office to defendant Currie, was, on motion of the State, substituted as defendant.

The legislative power to tax is limited only by constitutional provisions. Sec. 3, Art. V of our Constitution imposes the duty to tax in a just and equitable manner. It further provides: "Taxes on property shall be uniform as to each class of property taxed." Specific authority is given to tax trades, professions, franchises, and incomes. Literally the requirement of uniformity is confined to taxes on property, but repeated judicial interpretations extend this requirement to license, franchise, and other forms of taxation. *Assurance Co. v. Gold*, 249 N. C. 461, 106 S. E. 2d 875; *Roach v. Durham*, 204 N. C. 587, 169 S. E. 149; *S. v. Stevenson*, 109 N. C. 730; *Gatlin v. Tarboro*, 78 N. C. 119.

A tax statute which suffices to meet the rule of uniformity required by our Constitution likewise conforms to the

requirements of the Fourteenth Amendment of the U. S. Constitution.

Since courts are not charged with the duty of providing funds for the support of government, they have no right to weigh and determine legislative wisdom in selecting one form of tax over another or one class rather than another or the proportion of the whole tax burden which any class should fairly assume. It is the duty of a court, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. Merely assigning different names to members of the same groups is not sufficient to meet constitutional requirements, but, as said by *Mr. Justice Frankfurter*: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 84 L. ed. 1124. *Devin, J.* (later C. J.), put it this way: "It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes under the power conferred by Art. V, sec. 3 of the Constitution." *Bottling Co. v. Shaw*, 232 N. C. 307, 59 S. E. 2d 819.

Courts have approved legislative distinctions between wholesale and retail merchants, *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. 2d 316, appeal dismissed 308 U. S. 516; a single grocery store and a chain or grouping of such stores, *Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838, affirmed 284 U. S. 575; volume of business, *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. 2d 646, affirmed 332 U. S. 749; *Mercantile Co. v. Mt. Olive*, 161 N. C. 121, 76 S. E. 690; *Cobb v. Commissioners*, 122 N. C. 307; businesses conducted in areas of differing populations, *S. v. Green*, 126 N. C. 1032, *S. v. Carter*, 129 N. C. 560; handlers of meat products, *Lacy v. Packing Co.*, 134 N. C. 567, affirmed 200 U. S. 226; vending machines selling different kinds of merchandise, *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. 2d 19; transportation companies, based on mileage, *Clark v. Maxwell*, 197 N. C. 604, 150 S. E. 190, af-

firmed 282 U. S. 811; a retail sale by the producer of an article and the sale of the same article by a merchant, *Henderson v. Gill*, 229 N. C. 313, 49 S. E. 2d 754; stock companies and mutual insurance companies, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L ed 1011; an agent whose business is selling accident insurance and an agent of a transportation company who sells accident insurance as an incident and a part of his business of selling transportation, *Hunter v. Wright*, 152 S. E. 61 (Ga.); drug stores and news stands, even though both sell newspapers, magazines, tobacco, and soft drinks, *S. v. Towery*, 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed 347 U. S. 925.

Legislatures have for many years grouped and classified those engaged in lending money based on the manner in which the business was conducted. Pawn brokers are nearly always put in a class distinct from other money lenders, and this classification has been upheld. *S. v. Davis*, 157 N. C. 648, 73 S. E. 130; *S. v. Hill*, 69 A.L.R. 574, with annotations; *Metropolitan Trust Co. v. Jones*, 149 A.L.R. 1416, with annotations. True, most of these cases deal with the exercise of the police power rather than the power to tax, but the principle involved is the same. Classification, to be valid, must rest on a genuine distinction.

We assume the parties did not, by the 12th stipulation that no facts except as stipulated were material or necessary to a decision of the case, intend to deny us the right to take notice of pertinent public laws and facts of common and general knowledge

It is a matter of general knowledge that loans can be obtained by borrowers from many distinct kinds of business. The Federal Government has created special agencies to help certain types of borrowers. Illustrative: Home Owners Loan Corporation and Federal Land Banks, which as federal agencies, are free from State taxes. The principal private businesses making loans are insurance companies, taxed pursuant to Art. 8 b of our Revenue Act (c. 105 of the General Statutes); banks, taxed pursuant to Art. 8 c of the Reve-

nue Act; building and loan associations, taxed pursuant to Art. 8 d; pawn brokers, taxed under G. S. 105-50; installment paper dealers, licensed and taxed under G. S. 105-83; loan agencies or brokers, licensed and taxed under G. S. 105-88. Each of these varying kinds of businesses is defined by statute. Probably all make some loans identical in all respects with loans made by some other lending agency, but that fact does not make the businesses identical.

Installment paper dealers are defined by statute, G. S. 105-83, as "engaged in the business of dealing in, buying and or discounting installment paper, notes, bonds, contracts, evidences of debt and or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations." Those engaged in this business are by subsec. a of the statute required to pay an annual license tax of $100, and by subsec. b, to pay quarterly a tax equal to .275 of 1% of the face value of the obligations handled during such quarter.

The asserted invalidity of the statute is based on subsec. d, which reads: "This section shall not apply to corporations organized under the State or national banking laws." Although appellant has paid the taxes levied under subsecs. a and b, it does not claim that the tax levied under subsec. a is invalid. It limits its claim of invalidity to subsec. b. But if the statute is invalid because installment paper dealers and banks are in fact in the same class, the entire statute would fail, not merely subsec. b leaving in effect subsec. a which requires payment of $100 per year.

The business taxed under G. S. 105-83 is of comparatively recent origin. It came into existence primarily as a means to facilitate the sale of motor vehicles. We take judicial knowledge of the fact that there are many corporations engaged in this business. Some are financial giants and national in scope. Their shares are listed on various stock exchanges. Their resources run into hundreds of millions. They establish lines of credit and borrow from banks and insurance companies. They are created under statutes which authorize

the creation of business corporations in general. They do not have to secure a certificate of convenience and necessity to begin business. They do not receive deposits.

On the other hand, the statutory definition of a bank is "any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business." G. S. 53-1. Before a bank can be created, application must be made to the Commissioner of Banks who must determine the need for such an institution, fitness of the proposed incorporators to conduct the proposed business, and their ability to command the confidence of the community, G. S. 53-4. The powers which a bank may exercise are enumerated in G. S. 53-43. Their right to make investments and the kinds of investments which they may make are restricted, G. S. 53-46, 48. Banks must keep on hand or in approved depositories a fixed per cent of the monies on deposit, G. S. 53-50. They cannot establish branch offices without the approval of the Commissioner of Banks, G. S. 53-62. They are subject to regulations promulgated by the Commissioner of Banks, G. S. 53-104.

The foregoing are some of the things that distinguish a bank from an installment paper dealer. The distinction between banks and installment paper dealers is at least as great as the distinction between installment paper dealers and loan agencies or brokers, G. S. 105-88. The Legislature, in providing funds for governmental needs, had a right to recognize these distinctions. If perchance some banks are operating contrary to law and regulations promulgated by the Commissioner, that fact would not nullify a statute properly enacted by the Legislature.

Not long after the business defined by statute as installment paper dealers became economically important, several States, recognizing the distinction between such a business and the business of banking, taxed them differently. Where such statutes were challenged as arbitrary classifications, the courts upheld legislative action. *Dewey v. Richardson*, 92

N. E. 708; *Cowart v. Greenville*, 45 S. E. 122; *City Council v. Clark & Co.*, 52 S. E. 881; *Morris v. Lincoln*, 142 N. W. 114; *Link v. Commonwealth*, 265 S. W. 804; *Ormes v. Tenn. Finance Co.*, 269 S. W. 3; *Bradley & Co. v. Richmond*, 66 S. E. 872.

The facts stipulated, supplemented as they must be by matters of which we take judicial notice, support the conclusion reached by the trial court that plaintiff was not entitled to recover because of the asserted invalidity of the statute.

Affirmed.

APPENDIX C

Order on petition to rehear filed on July 7, 1961 and reads:

"Examined and denied this 7th July 1961. R. Hunt Parker and Carlisle W. Higgins, Associate Justices N. C. Supreme Court."